BEFORE

THE PUBLIC SERVICE COMMISSION OF

SOUTH CAROLINA

DOCKET NO. 2000-378-C – ORDER NO. 2001-1036

OCTOBER 29, 2001

| | | |
|---|---|---|
| IN RE: Southeastern Competitive Carriers Association, NewSouth Communications Corporation and TriVergent Communications | ) | ORDER RULING ON COMPLAINT |
| Complainants/Petitioners, | ) | |
| vs. | ) | |
| BellSouth Telecommunications, Inc., Respondent | ) | |

This matter comes before the Public Service Commission of South Carolina (the Commission) on the Complaint of the Southeastern Competitive Carriers Association (SECCA), NewSouth Communications Corporation (NewSouth), and TriVergent Communications (TriVergent) (collectively, the Complainants) against BellSouth Telecommunications, Inc.(BellSouth). The Complaint was filed under the authority of S.C. Code Ann. Section 58-9-576 (B)(5) (Supp. 2000) and Order No. 2000-676, our Order Ruling on Guidelines. The Complainants take issue with BellSouth's Win Back Promotion, which offers discounts to business customers being served by competitive local exchange carriers (CLECs) who return to BellSouth. The Complainants allege that BellSouth is abusing its market position, since the promotion solely targets customers of CLECs, and is anti-competitive. BellSouth denies the substantive allegations of the Complaint.

Accordingly, this matter was scheduled for hearing on February 22, 2001 in the offices of the Commission. The Honorable William Saunders, Chairman, presided. Frank Ellerbe, III, Esquire, represented the individual Complainants, Southeastern Competitive Carriers Association and NewSouth Communications Corporation. John J. Pringle, Jr., Esquire, represented TriVergent Communications. The Complainants presented the testimony of Jake E. Jennings, David K. Hudson, and Jack Lovegren. BellSouth Telecommunications, Inc was represented by Caroline N. Watson, Esquire, William F. Austin, Esquire, and Patrick Turner, Esquire. BellSouth presented the testimony of Cynthia K. Cox and Robert H. Sellman, III. The Commission Staff (the Staff) was represented by F. David Butler, General Counsel. The Staff presented the testimony of Joseph W. Rogers.

David K. Hudson of NewSouth testified for the Complainants. (Tr. at 13-50.) Hudson testified that the Win Back Promotion is designed to target customers of CLECs who were former BellSouth customers. The two aspects of the promotion were, first, a waiver of line connection charges for customers responding to the promotion, and, second, substantial discounts based on monthly billed revenues and the length of commitment that customers are willing to make to BellSouth. The discounts can be as much as 18% for customers with monthly total bill revenues of \$5,000-\$10,000 committing to BellSouth for a period of 36 months. Hudson stated that this program would be devastating to the CLECs, and that it hurts competition by making it difficult for a company like NewSouth to grow. The promotion, according to Hudson, lures away a CLEC's existing customers. Hudson also states that the promotion chills new entrants, and gives BellSouth a tool to avoid lowering prices to its vast group of customers who have not yet chosen to switch to another provider. The end result of the promotion, according to Hudson, is detrimental to competition.

Jake Jennings of NewSouth also testified. (Tr. at 50-85.) Jennings alleged that the promotions are unreasonably discriminatory and anti-competitive. Jennings urged the Commission to examine the goals of rapid competition in the local exchange market and all telecommunications markets, investment and innovation in the telecommunications market, and universal service. Jennings stated that BellSouth is still a monopoly provider, holding over 90% of the market share within its service territory in South Carolina. In addition, Jennings alleged that BellSouth is the sole supplier of network elements to CLECs. Because of these and other factors, Jennings stated that BellSouth is able to exert market power when competing with CLECs.

Jennings stated a belief that BellSouth's promotion is discriminatory, since it is only offering the promotion to business customers that have switched to CLECs, not all business customers. Jennings further stated a belief that the promotion should be offered to all business customers. Additionally, Jennings noted that the FCC has held that volume and term discounts should be made available to any customer with sufficient volumes or willing to commit to a given term. Further, Jennings opined that BellSouth's promotion discourages competition in the local exchange market. Lastly, Jennings urged the Commission to adopt safeguards that prevent BellSouth from abusing its market power within its local exchange area.

TriVergent presented the testimony of Jack Lovegren. (Tr. at 65-93.) Lovegren testified that the Win Back Promotion would have a harmful effect on the development of a competitive market for local exchange services in South Carolina. Lovegren noted that 99% of the customers that TriVergent seeks to serve have a prior relationship with BellSouth. BellSouth's Contract Service Arrangements, according to Lovegren, are provided to customers at rates that TriVergent cannot effectively counter without taking a loss. Lovegren goes on to describe BellSouth's "Key Customer" Program. In order to receive the benefits of this program, Lovegren notes that a customer must obligate itself to BellSouth for a period of one to three years. There is termination liability if a customer terminates this program early.

Lovegren opined that the Win Back Promotion is harmful to the development of meaningful local exchange competition, because BellSouth, with its history of prior relationships with customers, unlimited ability to offer deals and discounts, and financial wherewithal already enjoys advantages that will enable it to outbid a startup competitor, even without the existence of the Win Back Promotion. The CSA authority, in combination with promotions such as the Key Customer program and other promotions enables BellSouth to substantially preserve its market share and steadily increase its South Carolina revenues, according to Lovegren. Lovegren further stated a belief that the ability to target specifically those customers whom CLECs have been successful in garnering simply goes too far.

In addition, Lovegren disagreed with the notions propounded by BellSouth that the Win Back Promotion is the type of competition envisioned by the

Telecommunications Act of 1996, and that the Promotion is simply part of BellSouth's efforts to compete in the marketplace. Lovegren noted that the Public Utility Commission of Texas recognized the effect that Win Back programs can have on the development of a competitive market for local exchange services, and conditioned a Bell's entrance into the interLATA market on its willingness to forego the use of Win Back programs. Lovegren also states that BellSouth has withdrawn its Win Back Promotions in Tennessee, North Carolina, and Alabama before implementation.

BellSouth presented the testimony of Robert H. Sellman, III, Assistant Vice President Sales and Service, South Carolina and North Carolina, for BellSouth's Small Business Services organization. (Tr. at 93-158.) Sellman first described the Promotion at issue. The Promotion was filed with the Commission in May of 2000, and had expired at the time of the hearing on the matter. According to Sellman at the time of the hearing, twenty-five customers originally signed up for the promotion, and twenty-three were still participants at the time of the hearing. Subsequent to the hearing, BellSouth requested that its testimony in this regard be amended to show forty-nine participating customers. The Win Back Promotion provided limited discounts based on term agreements to previous BellSouth customers who wished to return to BellSouth for local telephone service. The Promotion provided eligible customers with monthly savings of 8% to 18% off their monthly total billed revenue, depending upon whether a customer selected a term agreement of 12, 24, or 36 months. The Promotion was available to previous BellSouth business customers who had elected to go to another service provider within the past two years, who chose to return to BellSouth, and who met certain terms and conditions. Generally, the Promotion was available to all business customers in South Carolina who were receiving service from another local exchange carrier and who met the other eligibility requirements for the Promotion. To be eligible, the business customer had to have monthly total billed revenue of $70-$10,000 when they left BellSouth and they had to be willing to sign a term agreement of 12, 24, or 36 months.

Sellman stated that BellSouth introduced the Win Back Promotion as a direct response to competition in the business market in South Carolina. Sellman noted that if BellSouth were somehow prohibited from attempting to win back customers who have left it for another carrier, those customers would be deprived of a competitive alternative that otherwise would be available to them. Sellman further stated that even after applying the deepest discount offered under the promotion, BellSouth's prices are still above most of the tariffed prices its competitors offer for comparable services. Sellman did note that, even with the discounts, the customers under the promotion pay more than the cost of the services. Sellman notes that it often takes more to win back a customer that has established service with a different provider than it does to keep a customer who already has service with BellSouth. This mitigated against offering the promotion to BellSouth's existing customers.

Sellman testified that BellSouth has lost anywhere from 20% to nearly 25% of its market share in South Carolina and it is continuing to lose market share at a steadily increasing rate. Sellman states that BellSouth must be able to compete to win back customers lost to competition, and that it is unfair for CLECs to compete for BellSouth's customers and to then attempt to insulate those customers from competition by

BellSouth. Sellman stated that the consumers of South Carolina are the ultimate beneficiaries of competition, and offers such as this Promotion and the customers in South Carolina who have signed up for this Promotion and are receiving its benefits, should be allowed to continue to receive those benefits. Sellman summarized by stating that this Commission should rule that it is appropriate for BellSouth to engage in Win Back activities like this Promotion.

Cynthia K. Cox also testified for BellSouth. (Tr. at 159-196.) Cox discussed the discrimination and anti-competition allegations contained in the Complaint in this matter. Cox stated that BellSouth's Win Back Promotion was a reasonable response to the actual competition that exists in South Carolina. First, Cox noted that Win Back Promotions are responses to competition from rivals and as such, they help to advance competition in the market. Cox testified that Win Back Promotions are means that BellSouth uses to respond to a specific competitive threat in a target, nondiscriminatory manner. Second, Cox testified that customers are the beneficiaries of the Win Back Promotions. Third, such Promotions have tremendous economic and public policy benefits, according to Cox.

Cox addressed Complainant witness Jennings' allegation that the Promotion violates the FCC's criteria. Cox stated that Jennings' focus is on the portion of the FCC Order that states that incumbent LECs "must make them available to any customer," but ignores the language concerning "significant volumes or willing to commit to a given term." Further, Cox notes that the FCC discussed Win Back efforts by incumbent local exchange carriers (ILECs) in its September 3, 1999 Order on Reconsideration and Petitions for Forbearance, CC Docket No. 96-149 (Order No. 99-223). Cox states that the

FCC noted in that Order that "restrictions on winback activities may deprive customers of the benefits of a competitive market." The Order went on to state that "Winback facilitates direct competition on price and other terms, for example, by encouraging carriers to "out bid" each other for a customer's business, enabling the customer to select the carrier that best suits the customer's needs." See Paragraph 69.

Cox goes on to state that the Promotion is consistent with BellSouth's promotional tariff provisions approved by this Commission. Further, one of the eligibility criteria for the Promotion is that the subscriber must be a former BellSouth customer. All former BellSouth customers that meet the eligibility criteria have an equal opportunity to participate in the Promotion, according to Cox. Therefore, in Cox's opinion, targeting a promotion to such customers is authorized by BellSouth's tariff. The Promotion is also consistent with S.C. Code Ann. Section 58-9-576(B)(5) (Supp. 2000), according to Cox.

The Commission Staff presented the testimony of Joseph W. Rogers, who is Coordinator of Telecommunications Tariffs for the Commission's Utilities Department. (Tr. at 197-219.) Rogers testified that on May 30, 2000, BellSouth filed a promotional offering called Welcome Back Winback and Winback Installation Program with the Commission. Staff found no improprieties with the promotional material as the result of its review of the promotions. The promotions were published on the Commission's June 5, 2000, Utilities Department Agenda as Items 6 and 7 on the "Advised" section of the agenda.

Rogers testified that a promotion is very similar to a sale on a particular product or products in the retail private sector. It is an incentive offered by a telecommunications carrier by offering a discount for a period of time or a waiver of non-recurring fees normally required for purchase of services. Rogers noted that the purpose of a promotion is to attract customers and to gain business.

Rogers opined that BellSouth had the authority to offer the Promotion in question to its customers in South Carolina, pursuant to Section A2.10.1 (A)(B) of BellSouth's General Subscriber Service Tariff. That section states that BellSouth may offer special promotions on new or existing services/products for limited periods. It further states that promotions will be offered on a completely non-discriminatory basis to all subscribers meeting eligibility criteria for each promotion. Rogers noted that eligibility criteria were defined in the Promotion under consideration. In this case, the promotion is available to former BellSouth customers who had left BellSouth for another local service provider and who want to return to BellSouth. Discounts, based upon monthly billed revenues and term periods of 12, 24, or 36 months, are uniform. To clarify, the promotion has a consistent criteria menu for customer qualification, according to Rogers. Rogers noted that the Win Back Promotion does not allow for so-called cherry-picking of subscribers to whom to offer the service.

Rogers further testified that Staff's review of the Promotion found it to be identical to a Contract Service Arrangement (CSA) which is offered to a customer in response to competition or in response to a competitive offer. Rogers expressed the opinion that the Win Back Promotion is a CSA in the format of a promotion.

Rogers also expressed the opinion that the Win Back Promotion does not impede local competition. A CSA is offered to an individual in response to a competitive situation. Rogers stated that CSAs are not impediments to competition. Similarly, the Win Back Promotion is offered to customers who have chosen to enter the competitive telecommunications market by "shopping" for a telecommunications provider. BellSouth could acquire a customer from a competing entity with or without the promotion. As BellSouth could offer a CSA to a previous customer in order to regain that customer and his business, Staff expressed the opinion that the Promotion does not impede local competition. In fact, Rogers states that the Promotion may actually promote competition. For example, NewSouth or TriVergent may obtain a BellSouth customer via resale of the Win Back Promotion.

Rogers testified that the Win Back Promotion is not discriminatory and applies equally to similarly situated customers who have entered the competitive marketplace by switching carriers. Since the promotion applies equally to customers meeting the eligibility criteria, the Staff discerns nothing discriminatory about the Promotion.

In summary, Rogers stated that if promotions such as this one are prohibited in South Carolina, then consumers may suffer. Rogers believes that promotions such as the Win Back Promotion could encourage carriers to reduce prices. Further, since a CSA could be used to provide a customer with the same service at the same discounted price as the service provided pursuant to the Win Back Promotion, Rogers fails to see potential harm to the public by the offering of the Promotion. Rogers finally stated that the Promotion is beneficial, in that it may be resold by a competitor of BellSouth, thereby providing another mechanism in the marketplace for consumers to benefit from competitive prices.

## FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. The subject of the complaint is the BellSouth Win Back Promotion. The Promotion has two aspects: 1) a waiver of line connection charges for customers responding to the promotion, and 2) substantial discounts based on monthly billed revenues and the length of commitment that customers are willing to make to BellSouth. The Promotion provided eligible customers with monthly savings of 8%-18% off of their monthly total billed revenue, depending upon whether a customer selected a term agreement of 12, 24, or 36 months. The Promotion was available to previous BellSouth business customers who had elected to go to another service provider within the past two years, who chose to return to BellSouth, and who met certain terms and conditions. Generally, the promotion was available to all business customers in South Carolina who were receiving service from another local exchange carrier and who met the other eligibility requirements for the promotion. To be eligible, the business customer had to have monthly total billed revenues of $70-$10,000 when they left BellSouth and had to be willing to sign a term agreement of 12, 24, or 36 months will BellSouth. The promotion had expired at the time of the hearing. Tr., Sellman at 100.

2. The Promotion was filed on May 30, 2000 with the Commission, and was published in the "Advised" section of the Commission's June 5, 2000 Utilities Agenda, all according to Commission procedure. Tr., Rogers, at 201.

3. BellSouth has the authority to file such a Promotion as per its General Subscriber Service Tariff, Section A2.10.1(A)(B). The tariff section provides that

promotions will be offered on a completely non-discriminatory basis to all subscribers meeting the eligibility criteria for each promotion. (Tr., Rogers at 202.)

4. The Win Back Promotion is identical to a Contract Service Arrangement (CSA) which is offered to a customer in response to competition or in response to a competitive offer. The Win Back Promotion is a CSA in the format of a promotion. Tr., Rogers at 203.

5. BellSouth had the authority to offer contract service arrangements pursuant to Order No. 84-804 in Docket No. 84-379-C and Order No. 98-1029 in Docket No. 98-378-C.

6. The Win Back Promotion does not impede local competition. The Promotion was available to any customer who left BellSouth and obtained service from a competitive local exchange carrier. CSA's such as the Promotion are offered in response to a competitive situation. The Win Back Promotion was offered to customers who have chosen to enter the competitive telecommunications market by shopping for a telecommunications provider. BellSouth could have acquired customers from competing entities with or without the Promotion. The Win Back promotion may actually promote competition, since New South or TriVergent could obtain a BellSouth customer via resale of the Win Back Promotion. Tr., Rogers, at 204-205. (See also Tr., Cox, at 163.) There is no abuse of market position by BellSouth.

7. The Win Back Promotion is not discriminatory. It applies equally to similarly situated customers who entered the marketplace by switching carriers. The Promotion applies equally to customers meeting the eligibility criteria. Tr., Rogers at 205.

8. The Win Back Promotion does not violate criteria laid out by the Federal Communications Commission. Although complainant witness Jennings asserts otherwise, the FCC in its September 3, 1999 Order on Reconsideration and Petitions for Forbearance, CC Docket No. 96-149 (Order No. 99-223) actually noted that restrictions on winback activities "may deprive customers of the benefits of a competitive market." Tr., Cox, at 165.

9. The testimony of Jack Lovegren of TriVergent is instructive, however. Lovegren opined that the Win Back Promotion is harmful to the development of meaningful local exchange competition, because BellSouth, with its history of prior relationships with customers, unlimited ability to offer deals and discounts, and financial wherewithal already enjoys advantages that will enable it to outbid a startup competitor, even without the existence of a Win Back Promotion. We do not agree with all of these assertions, however, we do agree that having prior relationships with customers may give BellSouth some slight advantage in the event of a Win Back-type situation. Accordingly, in the future, BellSouth shall be prohibited from engaging in any Win Back activities for ten (10) calendar days from the date that service has been provided to a customer by a competitive local exchange carrier. This prohibition includes the exchange of information within divisions at BellSouth related to notice that certain end users have requested to switch local service providers. Further, BellSouth is prohibited from including any marketing information in its final bill sent to customers that have switched local service providers. We agree with the FCC that Win Backs are useful as competitive tools, however, we believe that the above-stated restrictions may be helpful to at least allow a

consumer to sample a competitive local exchange carrier's service before being re-solicited by BellSouth.

10. The Complaint must be denied and dismissed, since the Win Back Promotion is neither anticompetitive, nor discriminatory, nor is there an abuse of market position by BellSouth, however, BellSouth shall be subject to the restrictions stated above.

11. This Order shall remain in full force and effect until further Order of the Commission.

BY ORDER OF THE COMMISSION:

Chairman

ATTEST:

Executive Director

(SEAL)